

No. 16335 ✓

United States
Court of Appeals
for the Ninth Circuit

DEWEY J. O'BRIEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

FILED

JUN 11 1959

Appeal from the United States District Court
for the District of Oregon.

PAUL P. O'BRIEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	7
Attorneys, Names and Addresses of.....	1
Certificate of Clerk.....	89
Complaint	3
Excerpt From Proceedings.....	33
Witnesses:	
Aufderheide, Robert	
—direct	38
Cummins, William	
—direct	73
—cross	81
—redirect	88
Laurila, John	
—direct	34
—cross	38
O'Brien, Dewey Jackson	
—direct	55
—cross	58
—redirect	59
—recross	60

	INDEX	PAGE
Witnesses—(Continued):		
Presstinen, Fred M.		
—direct		61
—cross		63
—redirect		63
Sage, D. J.		
—direct		70
Stone, J. Herbert		
—direct		64
—cross		68
Findings of Fact and Conclusions of Law.....		25
Judgment		30
Notice of Appeal.....		31
Opinion		20
Pretrial Order		9
Statement of Points on Appeal.....		31

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Portland, Oregon,
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In the United States District Court
for the District of Oregon

Civil 9266

DEWEY J. O'BRIEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes Now the Plaintiff and for his cause of action against the above-named Defendant, alleges the following facts:

I.

This action arises under the Federal Tort Claims Act of June 25, 1948, 62 Stat. 933, as amended by Act of April 25, 1949, 63 Stat. 62, and Act of May 24, 1949, 63 Stat. 101; U.S.C., Title 28, Sec. 1346b, as hereinafter more fully appears.

II.

That at all times hereinafter mentioned, Plaintiff was a passenger in a 1954 G.M.C. Suburban panel truck, commonly referred to as a "crummy," owned and operated by one Dean Glen Thompson.

III.

That at all times hereinafter mentioned, U. S. Highway No. 58 was a public highway providing for one lane northbound and one lane southbound

at and near Hells Gate Bridge, between Westfir and Oakridge in Lane County, Oregon.

IV.

That at all times hereinafter mentioned, the lands adjoining and immediately adjacent to said highway, at a point approximately 200 yards north of said Hells Gate Bridge, on the East side of said highway was owned by the United States of America.

V.

That on November 13, 1956, at or about 5 o'clock P.M., the "crummy" in which Plaintiff was riding, driven by one Dean Glen Thompson, was traveling south on said highway approaching a point approximately 200 yards north on said Hells Gate Bridge. That at said point, a dangerous, dead snag fell from the land owned by the United States of America and immediately adjacent to said highway on the east, upon and striking said "crummy," and Plaintiff sustained severe permanent injuries as hereinafter described.

VI.

That at all times herein mentioned, it was the common, regular practice and duty of the employees of the United States Government to regularly inspect the Federal lands adjacent to public highways and to fall or otherwise remove dangerous snags which were known or ought to have been known to be dangerous to persons, including Plaintiff, who were using said highway. That Defendant's agents and employees failed to inspect and

failed to remove the aforementioned dangerous snag from the lands immediately adjacent to said highway. That prior to the accident mentioned herein, the dangerous condition of the aforementioned snag was brought to the attention of employees and agents of the United States Government by one Ed Roberts of Oakridge, Lane County, Oregon, and said agents and employees of the United States Government refused permission to the said Ed Roberts to go upon said lands and to remove said snag and said agents and employees of the United States Government did expressly refuse to remove said snag. That by reason of the foregoing, Defendants were negligent in one or more of the following particulars, to wit:

(a) In failing to remove said dangerous snag.

(b) In failing to maintain their property so as not to create a dangerous condition to persons using said U. S. highway, including Plaintiff.

(c) In failing to give permission to said Ed Roberts to go upon the land and to cut and remove said tree and hazard.

(d) In failing to inspect the lands immediately adjacent to said highway where said accident occurred at all or prior to said accident.

(e) In failing to warn Plaintiff at all or prior to said accident of the dangerous condition created by allowing the dangerous snag to remain.

VII.

That as the proximate result of the negligence of the Defendant in one or more of the particulars

hereinabove set forth, Plaintiff suffered severe personal injuries, including a compound comminuted, grossly contaminated fracture of the distal of the right femur, including damage to the nerves, muscles, ligaments, tendons and soft tissues of the right leg. That all of said injuries are permanent. That Plaintiff has been caused to suffer severe mental and physical pain. That at the time of the happening of said accident, Plaintiff was a well, able-bodied, robust man of the age of 35 years and capable of engaging in strenuous activities and labor and had a life expectancy under the Standard Mortality Tables of 33.44 years. That by reason of the foregoing, Plaintiff has been generally damaged in the sum of Fifty Thousand Dollars (\$50,000.00). Plaintiff has incurred the services of hospitals and doctors and medical expenses of the reasonable value of One Thousand Four Hundred Nine Dollars and Seventy-four Cents (\$1,409.74) at the time of the filing of this complaint. Plaintiff has suffered the loss of earnings of Three Thousand Six Hundred Seventy-five Dollars (\$3,675.00) at the time of the filing of this complaint and will lose further wages and will incur further medical expenses and therefore Plaintiff alleges that he has been specially damaged in the sum of Five Thousand Eighty-four Dollars and Seventy-four Cents (\$5,084.74).

Wherefore, Plaintiff demands judgment against the Defendant in the sum of Fifty Thousand Dollars (\$50,000.00) general damages, in the sum of

Five Thousand Eighty-four Dollars and Seventy-four Cents (\$5,084.74) special damages and for his costs and disbursements incurred herein.

THOMPSON & SAHLSTROM,

By /s/ WILLIAM P. THOMPSON,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed July 12, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the Defendant, United States of America, by C. E. Luckey, United States Attorney for the District of Oregon, and Robert R. Carney, Assistant United States Attorney, and for answer to the complaint on file herein alleges:

First Defense

The complaint fails to state a claim against the Defendant upon which relief can be granted.

Second Defense

The Court lacks jurisdiction of the subject matter of the cause, in that the facts alleged in the complaint constitute a discretionary function within the meaning of the exception set forth in 28 USC 2680(a) to the jurisdiction conferred upon the Court by the Federal Tort Claims Act.

Third Defense

1. Defendant admits the allegations contained in Paragraphs I, II, III and IV with the exception that Defendant is informed and believes and therefore alleges that the subject roadway should be designated as "Old State Highway 58" and that the point in question is located 200 yards south of Hells Gate Bridge rather than 200 yards north of the same.

2. The Defendant denies the allegations contained in Paragraphs V, VI and VII of the complaint, and particularly denies that the Plaintiff was damaged in any sum whatever.

Fourth Defense

That the personal injury to Plaintiff as alleged in his complaint was not caused by the negligent or wrongful act or omission of any employee of the United States of America while acting within the scope of his office or employment.

Fifth Defense

1. That the government lands upon which the tree referred to in Plaintiff's complaint was growing are located in a rural area and are part of the Willamette National Forest, and said tree was not planted by the Defendant or its predecessors in title.

2. That "Old State Highway 58" referred to in Plaintiff's complaint was constructed pursuant to

a cooperative agreement entered into between the Federal government and the State of Oregon which imposes the duty to maintain said roadway upon the State of Oregon.

Wherefore, Defendant having fully answered Plaintiff's complaint herein, prays that the Plaintiff take nothing by his action and complaint be dismissed and held for nought, and that the Defendant be given judgment for its costs and disbursements incurred herein.

C. E. LUCKEY,

United States Attorney for
the District of Oregon;

/s/ ROBERT R. CARNEY,

Assistant United States Attorney, of Attorneys for
Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed October 17, 1957.

[Title of District Court and Cause.]

PRETRIAL ORDER

This cause came on before the undersigned Judge of the above-entitled Court on the 21st day of April, 1958, for pretrial conference, the Plaintiff appearing by E. B. Sahlstrom, his attorney, and the Defendant appearing by C. E. Luckey, United States

Attorney for the District of Oregon. With the consent of the Court, the following were stipulated as:

Agreed Facts

I.

That this trial proceed first on the segregated question of liability.

II.

That this action is commenced under the Federal Tort Claims Act of June 25, 1948, 28 USCA 1346(b) and 28 USCA 2674.

III.

That on November 13, 1956, the Plaintiff was a passenger in a 1954 GMC Suburban Panel Truck, commonly known as a "crummy," owned and operated by one Dean Glen Thompson, on a public highway extending between the communities of Westfir and Oakridge in Lane County, Oregon.

IV.

That on November 13, 1956, at a point on said highway near the Hell's Gate Bridge between Westfir and Oakridge in Lane County, Oregon, a snag fell from the forest lands immediately adjacent and adjoining said highway and owned by Defendant upon and striking the "crummy" in which Plaintiff was a passenger.

V.

That the Defendant did not inspect the snag prior to the accident of November 13, 1956.

Plaintiff's Contentions

The Plaintiff contends and the Defendant denies:

I.

That on November 13, 1956, while Plaintiff was riding in a "crummy" in a generally westerly direction on old U. S. Highway No. 58 between the communities of Oakridge and Westfir and at a point on said highway near Hell's Gate Bridge, a dangerous, dead, decayed, punky snag located on the real property of the Defendant fell from said lands and onto and over the "crummy" in which Plaintiff was riding along said public highway, causing Plaintiff severe personal injuries, as hereinafter described.

II.

That said dangerous snag was at all times prior to said accident clearly visible from said public highway and numerous employees and agents of Defendant, including Forest Service personnel and others, regularly traveled along said highway opposite the point where said snag was located and either knew or should have known of its presence, its dangerous characteristics and that it was capable of causing severe bodily harm to persons using said public highway and other persons in and about the area. That the public highway at the point where the accident occurred was a heavily traveled thoroughfare and that numerous residences, businesses, tourist facilities and a parking area were provided and maintained all in close proximity and the members of the public were invited by the De-

fendant to hunt, to fish and to hike in and over its lands, including the area where the accident occurred and from which the tree fell. That Defendant failed to inspect the lands and the dangerous snag at all or prior to said accident, failed to remove said dangerous snag and failed to give any or adequate warning to members of the public, including Plaintiff, of the danger created by allowing said snag to remain adjacent to said public highway.

III.

That by reason of the foregoing Defendant was negligent in one or more of the following particulars, to wit:

(a) In failing to inspect the dangerous snag and its lands immediately adjacent to said highway where said accident occurred at all or prior to said accident.

(b) In failing to warn Plaintiff at all or prior to said accident of the dangerous condition created by allowing the dangerous snag to remain in close proximity to the public highway.

(c) In failing to remove said dangerous snag at all or prior to said accident.

(d) In allowing a dangerous condition to exist on its lands, to wit: a dangerous dead, rotted, punky snag of great height and weight located on a steep hill at a point near the excavation, cut and grade of the highway, in close proximity to the public highway when they knew or should have known that said dangerous condition could readily cause bodily

harm to members of the public, including the Plaintiff.

IV.

That as a proximate result of the negligence of the Defendant in one or more of the particulars hereinabove set forth, Plaintiff suffered severe personal injuries, including a compound comminuted, grossly contaminated fracture of the distal end of the right femur, including damage to the nerves, muscles, ligaments, tendons and soft tissues of the right leg and a shortening of the right leg. That all of said injuries are permanent. That Plaintiff has been caused to suffer severe mental and physical pain. That at the time of the happening of said accident, Plaintiff was a well, able-bodied, robust man of the age of 35 years and capable of engaging in strenuous activities and labor and a life expectancy under the Standard Mortality Tables of 33.44 years. That by reason of the foregoing, Plaintiff has been generally damaged in the sum of Fifty Thousand Dollars (\$50,000.00). Plaintiff has incurred the services of hospitals and doctors and medical expenses of the reasonable value of One Thousand Nine Hundred Ninety-nine Dollars and Sixty-seven Cents (\$1,999.67), and will incur further medical expenses. Plaintiff has suffered a loss of earnings of Eleven Thousand Five Hundred Fifty Dollars (\$11,550.00), and therefore Plaintiff alleges that he has been specially damaged in the further sum of Thirteen Thousand Five Hundred Forty-nine Dollars and Sixty-seven Cents (\$13,549.67).

Defendant's Contentions

I.

That Defendant, its agents and employees owed no duty to the Plaintiff to protect him from the type of accident alleged herein under the circumstances alleged.

II.

That the Defendant was not negligent in any particular herein nor was any agent or employee of the Defendant negligent herein.

III.

That the Court lacks jurisdiction of this cause because failure to provide for inspection of roadside rural property for hazards to the traveling public would involve the exercise of a discretionary function.

IV.

That the highway on which the accident allegedly occurred was a public highway controlled and maintained by the State of Oregon in an area of rural forest land.

V.

That it was the custom and practice of the agents of the Oregon State Highway Department in connection with maintenance of the Willamette Highway known as Highway 58 and the highway on which the snag fell, which was generally known at the time of the accident as "Old Willamette Highway 58" after the previous re-routing and relocating of Highway 58 near this point, to request non-

mission to remove trees from the land of the Defendant adjoining said highway, which were considered by the said agents of the Oregon State Highway Department to constitute a hazard to the road or to the public traveler thereon, and for the agents of the Defendant to grant such permission upon request.

VI.

That the United States has not provided funds for the foresters supervising rural forest lands to inspect lands adjoining roads maintained by state agencies or for the removal of potential hazards to those traveling on such roads.

VII.

That no permission had been sought by the State agents or anyone else to cut the snag in question.

VIII.

Defendant denies Plaintiff's contentions except as they may be admitted by Defendant's contentions. Plaintiff denies Defendant's contentions.

Issues of Fact

I.

Was the Defendant negligent in one or more of the particulars charged?

II.

If so, was such negligence a proximate cause of the injury claimed by Plaintiff?

III.

What is the nature and extent of the injuries suffered by Plaintiff and how much has he been damaged thereby? (Segregated.)

Issues of Law

I.

Was there a duty on the government of the United States, as abutting landowner, to inspect rural trees in their natural state adjoining a public highway?

II.

Was there a duty to the traveling public on the part of the United States, because of its relationship with the road?

III.

Was there any negligence on the part of any agent or employee of the United States of America, Defendant, proximately causing Plaintiff's alleged injuries?

IV.

Was the duty to the traveling public, of which the Plaintiff was a member, if any duty existed under the facts alleged herein, that of the officials or agency charged with maintenance of the highway, i.e., the State Highway Department of the State of Oregon, and not the United States?

V.

Was the failure to provide for inspection of the roadside rural property for hazards to the traveling

public, a discretionary function resulting in this action being excepted from the consent of the United States to be sued provided under the Federal Tort Claims Act?

VI.

Was the Plaintiff's injury, if any, the result of an act of God?

VII.

Was the Plaintiff injured as a proximate result of negligence of the Defendant or Defendant's agents or employees and under circumstances under which a private landowner would be responsible for such injuries, if any?

Plaintiff's Exhibits

1. Series of X-rays.
2. Series of photographs.
3. Income tax returns.
4. Withholding slips and earnings records.
5. Hospital chart, notes, nurses notes and records.
6. Deposition of Robert Aufderheide.
7. Survey chart of accident scene.
8. Series of medical bills.
9. Series of administrative use permits granted to Oregon State Highway Dept.
10. Series of cooperative agreements between Defendant and State of Oregon.
11. Sample of wood from butt of snag.
- 12. Series of contracts between Lane Veneer and Fred Lemery.**

Defendant's Exhibits

1-17—Are cooperative agreements re construction and maintenance of the road in question between the Bureau of Public Roads, U. S. Forest Service, and the Oregon State Highway Commission, dated as follows:

Ex. 1—July 13, 1922.

Ex. 2—April 18, 1923.

Ex. 3—July 30, 1928.

Ex. 4—June 18, 1930.

Ex. 5—March 12, 1931.

Ex. 6—November 13, 1931.

Ex. 7—August 8, 1932.

Ex. 8—October 28, 1932.

Ex. 9—October 17, 1934.

Ex. 10—July 19, 1937.

Ex. 11—November 29, 1937.

Ex. 12—March 4, 1939.

Ex. 13—April 7, 1950.

Ex. 14—December 18, 1950.

Ex. 15—July 13, 1953.

Ex. 16—April 5, 1955.

Ex. 17N—November 4, 1955.

18—Series of photographs of scene of alleged accident.

19—Map of the area.

20—Map of the area.

21—Excerpt from Minutes of Meeting, December 19, 1950, of Oregon State Highway Commission, entered on Page 17456, Part 3 of Volume 35, of

Minute Book of the Oregon State Highway Commission.

22—Letter dated November 26, 1956, from Oregon State Highway Department, Division Engineer, to Acting Maintenance Engineer, Salem, Oregon.

23—Agreement dated June 10, 1957, between the State of Oregon and Lane County, Oregon.

24—Letter dated June 18, 1936, from Oregon State Highway Commission to Mr. W. H. Lynch, District Engineer, Bureau of Public Roads.

25—Letter dated October 8, 1953, from Oregon State Highway Commission to Mr. W. H. Lynch, District Engineer, Bureau of Public Roads.

26—Letter dated October 16, 1953, from Oregon State Highway Commission to Mr. W. H. Lynch, District Engineer, Bureau of Public Roads.

27-34—Series of Administrative Use Permits to cut snags:

Ex. 27—12/2/46 (issued), 1/30/48 (comp'd).

Ex. 28—8/30/46 (issued), 1/23/48 (comp'd).

Ex. 29—10/29/45 (issued), 1/2/46 (comp'd).

Ex. 30—9/13/44 (issued).

Ex. 31—10/27/47 (issued).

Ex. 32—6/20/49 (issued).

Ex. 33—11/3/48 (issued).

Ex. 34—11/20/56 (issued).

The foregoing is a pre-trial order agreed upon at the conference between counsel and the Court. It shall not be amended at trial except by consent or to prevent manifest injustice. It supersedes the pleadings, which now pass out of the case.

Dated at Portland, Oregon, this 14th day of May, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

Approved by:

/s/ E. B. SAHLSTROM,
Of Attorneys for Plaintiff.

/s/ C. E. LUCKEY,
United States Attorney,
of Attorneys for Defendant.

Lodged April 22, 1958.

[Endorsed]: Filed October 10, 1958.

[Title of District Court and Cause.]

OPINION

September 30, 1958

Solomon, Judge:

Plaintiff filed an action against the United States pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C.A Sec. 1346(b), for injuries he received when a tree in the Willamette National Forest broke, fell across the adjacent highway and struck the vehicle in which Plaintiff was riding.

The Willamette National Forest contains more than 1,600,000 acres of forest lands in their natural state and is located in Western Oregon. There are approximately 19,200,000 acres of land in Western

Oregon, of which 82 per cent, or approximately 15,600,000 acres, consist of commercial and non-commercial forest lands. Practically all of these lands are commercial forests, and ownership thereof is about equally divided between the United States and private persons.

Just before its fall, the tree was on a hill about 84 feet upward and 112 feet from the center line of the road. It was dead and apparently had been dead for some time. Although Forest Service employees obviously knew that trees were on this tract and that some of them were dead, they did not know of the existence or condition of this particular one. A dead tree is not necessarily a dangerous tree.

The tree fell across the Old Willamette Highway at a point approximately 40 miles from Eugene, Oregon, the county seat of Lane County. In recent years, this highway has had little traffic because the new Willamette Highway 58 provides a more direct route for traffic between Eugene and Oakridge.

The State of Oregon maintains hundreds of miles of public highways which run through rural forest lands. Under various agreements between the State of Oregon and the Federal Government, the Oregon State Highway Department has assumed responsibility for the maintenance of the Old Willamette Highway. Its employees have made periodic inspections of the timberland adjoining the highway, and upon request have received permission from the United States Forest Service to cut particular trees deemed to be potential sources of danger.

Under the Federal Tort Claims Act, the United States is liable for damages:

“for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C.A. Sec. 1346(b).

Plaintiff contends that the United States as a property owner was negligent in failing to make periodic inspections of its forest lands in order to discover potential dangers to the traveling public. Whether such failure constitutes negligence must be decided in accordance with Oregon law. *Olson v. United States*, 175 F.2d 510 (1949).

There are no Oregon cases in point. Plaintiff has asked us to find that Oregon will adopt the rule laid down in the following cases in which recovery was permitted: *Brandywine Hundred Realty Co. v. Cotillo*, 3 Cir. 1931, 55 F.2d 231, *Brown v. Harrison*, (CA eng. 1947) 177 L.T.R.(N.S.) 281, and *Hay v. Norwalk Lodge No. 730 B.P.O.E.*, (Ohio 1951) 109 NE.2d 481. In the *Brandywine* case, Plaintiff was driving on one of the principal through roads of Delaware, about two miles north of Wilmington, when a chestnut tree located on Defendant's land, about 10 feet from the road,

broke and fell on Plaintiff's automobile. In *Brown v. Harrison*, Plaintiff was injured when traveling on the highway from Knowle to Warwick, England, when a chestnut tree in an obvious state of decay, 18 feet from the highway, broke. In *Hay v. Norwalk Lodge No. 730 B.P.O.E.*, Plaintiff's decedent was killed when limbs from a tree located on Defendant's property fell on the highway. The complaint alleged that large limbs from the tree extended over and above the traveled portion of New State Road; that several years prior to the accident the tree had been struck by lightning and had been extensively weakened and damaged. It further alleged that although Defendants had knowledge of these facts, they had failed either to remove the tree or to brace and secure it, and had failed to give notice of such defect to the traveling public. The Supreme Court of Ohio held that the complaint stated a cause of action.

In all of these cases the tree which fell was either in or within a few feet of a highway and was located in well-populated areas. Not one was from forest lands in their natural state or from an area in which there were many such lands.

The *Hay* case is distinguishable on the additional ground that the complaint alleged actual notice of the defective condition. The Court, after an extensive examination of the authorities, “* * * concluded that, although there is no duty imposed upon the owner of property abutting a rural highway to inspect growing trees adjacent thereto to ascertain defects which may result in injury to a traveler

on the highway, an owner having knowledge of a patently defective condition of a tree which may result in injury to a traveler on a highway must exercise reasonable care to prevent harm from the falling of such tree or its branches on a person lawfully using the highway." 109 N.E.2d 481, 486. Because of its reliance on actual notice, the Ohio court does not adhere to the rule laid down in either *Brandywine Hundred Realty Co. v. Cotillo* or *Brown v. Harrison*, but is actually aligned with the courts which follow the opposite rule.

The leading case which holds there is no duty to inspect is *Chambers v. Whelen*, 4 Cir. 1930, 44 F.2d 340. In that case the tree which fell was situated 20 feet from a public highway in a large tract two miles from Welch, West Virginia. There were no dwelling houses in the vicinity. The question presented was "whether the owner of land in a rural section is charged with the duty of keeping himself informed as to the condition of trees growing on his property alongside the public road, so that failure to perform this duty constitutes actionable negligence."

The late Judge John J. Parker, speaking for the Court, held that there was no such duty for the reason that the danger to travelers is a remote one and the imposition of a duty to inspect would be an intolerable burden on the land owner.

He also came to the conclusion that "(t)he inspection and removal of trees standing near a highway is, in substance, not a matter affecting the use of

the abutting property, but a matter affecting the safety of the road * * * and the duty of inspection would seem to rest upon those whose duty it is to make the highway safe." See also *Zacharias v. Nesbitt*, 150 Minn. 369, 185 N.W. 295, and *Patterson v. Canadian Robert Dollar Company Ltd.*, (1928) 41 B.C. 123.

The economy of Oregon is largely dependent upon the lumber industry. Millions of acres of land in Oregon are in natural forests. It is unthinkable that the Oregon courts would impose upon the owners of forest lands, adjacent to little-used roads in sparsely-settled areas, the duty to inspect and remove trees which are likely to fall because of natural decay.

In this case the location of the tree which fell, the absence of knowledge of its existence or condition, and the assumption of responsibility by the Oregon State Highway Department for the condition of the roads all require a judgment in favor of the Government.

[Endorsed]: Filed September 30, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause having on May 14, 1958, come on before the Court for trial, and a pretrial order having been entered, and it having been agreed by

the parties and the Court having ordered that the trial proceed first on the segregated question of the Defendant's liability, and the Court having heard testimony, considered the exhibits, and considered the arguments and briefs filed herein, and being advised, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That the Plaintiff is a resident of Oregon.
2. That on November 13, 1956, the Plaintiff was a passenger in a 1954 GMC Suburban Panel Truck, commonly known as a "crummy," owned and operated by one Dean Glen Thompson, on a public highway extending between the communities of Westfir and Oakridge in Lane County, Oregon.
3. That on November 13, 1956, at a point on said highway near the Hell's Gate Bridge between Westfir and Oakridge in Lane County, Oregon, a snag fell from the forest lands immediately adjacent and adjoining said highway and owned by Defendant, upon and striking the "crummy" in which Plaintiff was a passenger.
4. That just before its fall, the tree was on a hill about 84 feet upward and 112 feet from the center line of the road. It was dead and had apparently been dead for some time.
5. The Forest Service employees knew that trees were on the tract from which the tree fell and it

could be reasonably expected that some of the trees in the tract would be dead.

6. A dead tree is not necessarily a dangerous tree.

7. The employees of the Forest Service did not know of the existence or condition of the particular tree which fell across the vehicle in which the Plaintiff was riding.

8. The Court takes judicial notice and the evidence corroborates that the Willamette National Forest contains more than 1,600,000 acres of forest lands in their natural state and is located in Western Oregon; that there are approximately 19,200,000 acres of land in Western Oregon, of which 82 per cent, or approximately 15,600,000 acres consist of commercial and non-commercial forest lands; that practically all of these lands are commercial forests, and ownership thereof is about equally divided between the United States and private owners.

9. The tree fell across the Old Willamette Highway at a point approximately 40 miles from Eugene, Oregon, the county seat of Lane County, in an area rural in character.

10. A relocation of the Willamette Highway some months before the accident had diverted much of the traffic formerly using the particular portion of highway where the tree fell for travel between Eugene and Oakridge, Oregon, because the new route was an improved and more direct route.

11. The State of Oregon maintains hundreds of miles of public highways which run through rural forest lands, and on November 13, 1956, at the time of the accident complained of, had assumed full responsibility for maintenance of the Old Willamette Highway at the point where the accident occurred, by practice and under various agreements between the State of Oregon and the United States.

12. Employees of the State of Oregon, pursuant to such responsibility, have made periodic inspections not only of the traveled portion of the highway and highway right-of-way, but of the adjoining timber land, and in recognition of such responsibility, employees of the State of Oregon have made request for and received permission from the United States Forest Service to cut particular trees deemed to be potential sources of danger.

13. The State of Oregon employees had made no such request concerning this particular tree which fell.

14. The employees of the Defendant did not inspect the snag prior to the accident herein.

15. The failure of the Defendant's employees to inspect the tree which fell was not negligence, and neither the United States nor any of its agents or employees was guilty of any negligent or wrongful act or omission proximately causing damage to the Plaintiff.

Conclusions of Law

1. Whether the United States, as a property owner, was negligent in failing to make periodic inspections of its forest lands abutting rural public roads in order to discover potential dangers to the traveling public must be determined in accordance with Oregon law.

2. Under the facts of this case, the United States and its employees had no duty to inspect its property or objects thereon for the purpose of insuring that the highway would not be so obstructed.

3. The injury to the Plaintiff was not caused by the negligence of the United States or its employees.

4. The United States is not liable to Plaintiff under the Federal Tort Claims Act.

Let judgment be entered accordingly.

Dated this 24th day of October, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

Presented By:

/s/ C. E. LUCKEY,
United States Attorney,
of Attorneys for Defendant.

[Endorsed]: Filed October 24, 1958.

In the United States District Court
for the District of Oregon

Civil 9266

DEWEY J. O'BRIEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause having been tried before Court, and the Court being fully advised and having made and filed its Opinion and Findings of Fact and Conclusions of Law,

It Is Hereby Ordered and Adjudged That the Defendant have judgment herein and that the Plaintiff take nothing by this action.

Made and Entered this 24th day of October, 1958.

/s/ GUS J. SOLOMON,

United States District Judge.

Presented By:

/s/ C. E. LUCKEY,

United States Attorney,

of Attorneys for Defendant.

[Endorsed]: Filed October 24, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Dewey J. O'Brien, Plaintiff above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain Judgment made and entered in this action on the Twenty-fourth Day of October, 1958.

E. B. SAHLSTROM,

PHILIP A. LEVIN,

By /s/ PHILIP A. LEVIN,

Attorneys for Plaintiff-
Appellant.

[Endorsed]: Filed December 17, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now Plaintiff, Dewey J. O'Brien, by and through his attorneys, E. B. Sahlstrom and Philip A. Levin, and files this his statement of points and designation of record on appeal;

Plaintiff will rely upon the following points:

1. The Court erred in finding that, "The failure of the Defendant's employees to inspect the tree which fell was not negligence, and neither the United States nor any of its agents or employees

was guilty of any negligent or wrongful act or omission proximately causing damage to the Plaintiff."

2. The Court erred in concluding that, "Under the facts of this case, the United States and its employees had no duty to inspect its property or objects thereon for the purpose of insuring that the highway would not be so obstructed."

3. The Court erred in concluding that, "The injury to plaintiff was not caused by the negligence of the United States or its employees."

4. The Court erred in concluding that, "The United States is not liable to Plaintiff under the Federal Tort Claims Act."

5. The Court erred in failing to hold that the Defendant United States had a duty to make reasonable inspections of its forest lands abutting public roads in order to discover and remove potential dangers to the traveling public.

6. The Court erred in failing to hold that the Defendant had actual or constructive notice of facts sufficient to put it upon inquiry as to the condition of the tree which fell and injured Plaintiff.

7. The Court erred in failing to find that the Defendant was guilty of negligence in the above respects which was a proximate cause of the injury to the Plaintiff.

8. The Court erred in failing to find that the

Defendant was liable to Plaintiff under the Federal Tort Claims Act.

Dated this 9th day of January, 1959.

E. B. SAHLSTROM,

PHILIP A. LEVIN,

By /s/ PHILIP A. LEVIN,

Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed January 9, 1959.

[Title of District Court and Cause.]

Before: Honorable Gus J. Solomon,
U. S. District Judge.

EXCERPT FROM PROCEEDINGS

Appearances:

E. B. SAHLSTROM,

Attorney for Plaintiff.

C. E. LUCKEY,

United States Attorney, District of Oregon,
Attorney for Defendant.

Morning Session

(At 9:15 A.M., Wednesday, May 14, 1958, the following proceedings were commenced, opening statements omitted:)

JOHN LAURILA

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Court, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. State your name, please.

A. John Laurila.

Q. Where do you live, Mr. Laurila?

A. In Eugene, Oregon.

Q. What address?

A. 289 Van Avenue.

Q. What is your occupation?

A. I am a registered professional engineer.

Q. By whom are you employed, or with?

A. I am a partner in Western Engineering Consultants.

Q. They have offices here in Eugene?

A. That's right.

The Court: Is there any question about his qualifications? [2*]

Mr. Luckey: No.

The Court: Please continue.

Mr. Sahlstrom: At my request did you make a survey and a map of the area from which the tree fell as referred to in this case?

A. Yes, I did.

The Court: Is there any objection to the map?

Mr. Luckey: I don't think so, your Honor. I haven't seen the map.

(Testimony of John Laurila.)

The Court: It will be admitted.

(At this point a survey chart of accident scene was marked for Identification and received in evidence as Plaintiff's Exhibit No 7.)

Q. (By Mr. Sahlstrom): Will you take a pointer, please, and describe the area to the Court and describe the location of the tree? Tell us what the scale is.

A. Is there a pointer around?

Mr. Sahlstrom: The Bailiff will hand it to you.

The Witness: This is the bridge referred to as Hells Gate Bridge by the Highway Department. It crosses the middle fork of the Willamette River near Westfir.

This road here (indicating) runs north to Westfir and the highway continues to Oakridge in this direction here (indicating). [3]

The tree that is involved is on a slope right here on the Government property at the edge of the State Highway right-of-way line.

The Court: Now, tell me, this is what they call the old highway?

The Witness: That's the old highway. There is a new highway that takes a different route to Oakridge now subsequently.

The Court: How far is the old highway from the new highway?

Q. (By Mr. Sahlstrom): Across the river?

A. Just across the river, I'd say, four or five hundred feet.

(Testimony of John Laurila.)

The Court: How long ago was the new highway built?

The Witness: I'd say within the last three years.

Q. (By Mr. Sahlstrom): Mr. Laurila, is this the road there between Westfir and the communities of Willamette City and Oakridge?

A. This one goes to Westfir (indicating).

Q. Yes. Is that the road you would take to go from Westfir to Oakridge?

A. Yes. That's right.

Q. Show him where you would go to Oakridge.

A. Oakridge in this direction (indicating).

Q. Is that map drawn to scale?

A. Yes.

Q. What is the scale?

A. One inch to 20 feet.

Q. Point to the location of the stub of the tree where the tree fell from?

A. The stub is down here. And where it originated is up here (indicating),—

Q. All right.

A. —the red dot up here.

Q. How many feet from that red dot down to the highway proper?

A. About 112 as it was stated previously is correct.

The Court: You mean it fell all across the highway and extended beyond the highway?

Mr. Sahlstrom: Yes.

The Witness: It must have, because this is

(Testimony of John Laurila.)

where we located the rotted part that had fell from up here (indicating).

Q. (By Mr. Sahlstrom): Will you mark with an "X" the location of where the top of the tree now is on the lower bank of the river?

(At this point the witness did as requested.)

Q. Now, what is the width of the highway at that point, approximately?

A. The right-of-way width?

Q. No, the highway, the paved portion? [5]

A. 22 feet wide, asphalt surface.

Q. On the upper side is there a bank?

A. Yes, there is, and a ditch along the bank.

Q. What is that?

A. And a ditch—a drainage ditch along the bank.

Q. Does the map show where the bank starts and where it ends?

A. Yes. It starts at the ditch line.

Q. Where does it end?

A. Just continues up (indicating).

Q. Is the line drawn there where the bank ends?

A. No; only the right-of-way line is.

Q. Is that a steep bank? A. Yes, it is.

Q. Is the tree from which this—or the snag that fell, is that near the edge of that bank, the upper edge of the bank?

A. Well, the hillside continues quite a distance up.

Q. All right.

(Testimony of John Laurila.)

A. And this snag is on the edge of the hill.

Mr. Sahlstrom: I have no further questions.

Cross-Examination

By Mr. Luckey:

Q. When was the map made? [6]

A. The map was made just very recently; April 22nd. But the field information was taken one year ago, March 7th, '57.

Q. By you? A. By me, yes.

Q. Of course, when you speak of where the rest of the stump is you have no knowledge of where it actually fell?

A. No; just as I located it in the field.

Mr. Luckey: Thank you.

The Court: That is all.

Mr. Sahlstrom: No further questions.

(Witness excused.)

Mr. Sahlstrom: I will call Mr. Aufderheide. [7]

ROBERT AUFDERHEIDE

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. What is your address, Mr. Aufderheide?

A. 2240 Friendly Street, Eugene, Oregon.

Q. What is your occupation?

(Testimony of Robert Aufderheide.)

A. I am Forestry Supervisor, Willamette National Forest.

Q. Was that your employment on the 13th day of November, 1956? A. Yes.

Q. What are your general duties?

A. General administration of the Willamette National Forest.

Q. From where this tree fell, is that a part of the Willamette National Forest? A. Yes.

Q. Is it under your direct supervision and control? A. Yes.

Q. How many men do you have under your employment?

A. We have approximately 150 year-long people. And our employment varies seasonally; in the summertime a maximum of about 425.

Q. In the immediate area do you have any office located where this tree fell from? [8]

A. We have a ranger headquarters at Oakridge.

Q. How many miles is that from where the tree fell?

A. Oh, I think it would be approximately three miles.

Q. How many people do you have there?

A. Year-long people, we have around six or eight people.

Q. Yes. In connection with your work do you have occasion to go along this highway, travel along this highway—— A. Yes.

Q. ——Where the tree fell from? A. Yes.

(Testimony of Robert Aufderheide.)

Q. About how often would you do so prior to November 13th, '56?

A. Probably about 10, 12 times a year.

Q. As you would proceed along would you take occasion to look to either side to examine the timber as you went along?

A. I do look at timber, yes. This particular area would be visible to you going east. As you are coming off the bridge approach and rounding a curve the tree would stand on a high bank. I think going west you probably wouldn't see it.

The Court: Can you tell from the highway whether a tree is rotted or in good shape?

The Witness: No. You could to some extent if you saw the tree. But I have no recollection of ever having seen this particular tree during my [9] travels.

But you can tell something about the condition of a tree just at a casual glance all right.

Q. (By Mr. Sahlstrom): You could tell if the tree was dead from the highway, couldn't you?

A. Yes.

Q. You could tell it was a snag, couldn't you?

A. Yes.

Mr. Sahlstrom: All right. Hand him the defendant's photographs.

(At this point a manila folder containing a series of photographs was marked for Identification as Defendant's Exhibit 18.)

Q. (By Mr. Sahlstrom): Handing you Defend-

(Testimony of Robert Aufderheide.)

ant's Exhibit 18, would you examine those, please? Now, Mr. Aufderheide, did you have occasion to visit the place where the tree fell after the accident?

A. Yes. I was there yesterday.

Q. And you have been there prior to that time, have you not?

A. I have been by there on the highway and have stopped on the highway earlier this year.

Q. Now, handing you Defendant's Exhibit No. 18, are those photographs that fairly portray the scene where the accident happened?

A. Yes. [10]

Q. And can you point out to his Honor the stub of the tree from where the snag fell?

(At this point the witness did as requested.)

Q. Is that tree visible from the highway?

The Court: He has alreday testified to that; one way it is and one way it isn't.

The Witness: Yes, it is.

Q. (By Mr. Sahlstrom): Now, in the course of the employment would other men of your department have occasion to use the highway, too?

A. Yes.

Q. About how often do you think and how many?

A. Well, we have sales administration up the North Fork of the Willamette. And I imagine that that would be traveled by some of our people at least twice a week up that area, maybe oftener; I don't know.

(Testimony of Robert Aufderheide.)

Q. Is it a part of their job to, as they drive along, look for snags in connection with timber sales?

A. We have been interested in salvaging dead material that is merchantable. And people engaged in timber sale business certainly look for salvage possibilities.

Q. To answer the question specifically, isn't it a part of your job to determine whether or not there are snags in a given area, to see if it is economically feasible to have a timber sale of those snags? [11]

Mr. Luckey: I would suggest that is irrelevant, your Honor.

The Court: In a given area; is that your question?

Mr. Sahlstrom: Yes.

The Court: Was it part of your duties to determine the number of snags in this area or the amount of snags to determine whether it would be economically feasible to remove the snags?

The Witness: This—I might explain our situation in this way: We have cut snags along the highway strips. It is the policy of the Service in agreement with the Highway Department to maintain a natural appearance along these highways.

Now, where we do it under timber sale administration we have to have ground that is favorable enough so that we can remove the merchantable trees with tractors. This particular bank is very steep. It's got, I think, an 84 vertical—practically a vertical foot rise to the edge of the timber and

(Testimony of Robert Aufderheide.)

then there is a steep hillside continues from there. We could not—we cannot remove snags or dead trees in highway strips where they're very scattered.

I think our observation here would be——

Mr. Sahlstrom: Just a minute. I object to any conjecture unless you made an observation of this given area.

The Witness: Well, my observation of this area is that [12] there are no—there is no economical logging chance.

Q. (By Mr. Sahlstrom): Have you made an observation of it?

A. Yes; I have made an observation.

Q. When? A. Well, recently.

Q. Well, since the deposition was taken, is that what you mean?

A. Yes. Yes. I had no recollection whatever of this area before that time.

Q. Yes. Now, were aerial photographs taken of this area by your department?

A. We have aerial photos of the forest.

Q. Do you have them before you there? Handing you Defendant's 18, what does that series of aerial photographs portray?

A. This portrays the location of the general area, the snag and surrounding area.

Q. When were those taken by your department?

A. Mr.—one of our people here has that information. I don't have that.

Q. I am advised by your counsel that they were taken in 1955. Is that correct?

(Testimony of Robert Aufderheide.)

Mr. Luckey: I am advised in 1955, your Honor
The Court: All right.

Q. (By Mr. Sahlstrom): Now, what is the purpose of taking those aerial photographs? [13]

A. We use these aerial photos to help us—help give us information about timber and road locations.

The Court: Can you see the snag from an aerial photo? The Witness: No.

Q. (By Mr. Sahlstrom): When you take the aerial photo, don't you have some kind of lens that you use to look at the photo with? A. Yes.

Q. Then you can see the trees, can't you?

A. You can see individual trees. It would still be difficult to pick out an individual snag. There is some degree of obliqueness to these photos and it just depends on what particular—

Q. You would have some difficulty, but you can do it, can't you?

A. If conditions are ideal. You could not pick out every individual snag.

Q. Well, isn't that part of your purpose of taking aerial photographs, to see how many snags there are in some given area?

A. No. No, not solely, not as such.

Q. Well, isn't that one of your purposes?

A. You could tell very little from snags unless they were concentrated groups of killing in these areas. The main purpose of the aerial photos is to give you a picture of the topography [14] and general idea of the timber. You can distinguish old-growth from younger stands.

(Testimony of Robert Aufderheide.)

Q. That wasn't my question. Is it one of the purposes to determine if there are snags in a given area?

The Court: Can you answer that Yes or No and then you can explain.

The Witness: Well, the big purpose——

The Court: Well, we know what the big purpose is. But we will ask you, is one of the major purposes to determine snags?

The Witness: No.

The Court: Is one of the minor purposes to determine snags?

The Witness: Yes. It would be a minor purpose or minor—it would be a minor use you would get out of the photos.

The Court: A minor use but not a purpose for taking the film?

The Witness: That's right.

Q. (By Mr. Sahlstrom): Then how are they used in determining the quantity of snags? Tell the Court about that.

A. Well, our observations on the photos are checked through reconnaissance trips through the area. You—I doubt whether a person could tell how many snags were on an area from just an examination of the aerial photos unless they were extremely—unless through a burn there was a big concentration of them. [15]

The Court: Could you tell the existence of one snag near the highway——

(Testimony of Robert Aufderheide.)

The Witness: No.

The Court: —from the use of an aerial photo?

The Witness: I don't believe so.

The Court: Is even a minor purpose of these aerial photos to determine the presence of danger trees?

The Witness: No. You couldn't tell whether they were danger trees. There are a lot of green trees that have rot and have indications that would put them in that category.

The Court: All right.

Q. (By Mr. Sahlstrom): I want to ask you this question, Mr. Aufderheide. Do you recall the time your deposition was taken up in Mr. Luckey's office with respect to this case?

A. Well, I recall the deposition.

Q. At Page 23 of that deposition the following questions were asked to you and you gave the following answers:

"A. You determine that from your travels, both road travel and examination of aerial photos, and we fly the forest annually.

"Q. And you take aerial photographs?

"A. We don't take aerial photographs every year, but we have some that are available.

"Q. You have in your files an aerial photograph of this particular area, I would take it. [16]

"A. I would say so.

"Q. From that you can ascertain the number of snags? Is that correct? A. Yes.

(Testimony of Robert Aufderheide.)

“Q. Which would include the snag which we have reference to here?

“A. I would say so.”

Were those questions put to you and were those your answers at that time? A. Yes.

Mr. Sahlstrom: I will offer it in evidence as Plaintiff's Exhibit No. 6.

The Court: All right. It is admitted.

(At this point the deposition of Robert Aufderheide was marked for Identification and received in evidence as Plaintiff's Exhibit 6.)

Q. (By Mr. Sahlstrom): Now, since the deposition was taken, Mr. Aufderheide, have you had occasion to go up there and examine the snag itself or the remainder of that snag?

A. Yes; I did that yesterday.

Q. I want to show you a few samples taken from that snag for your examination here. They are Plaintiff's Exhibit No. 11.

(At this point the witness examined some material taken from a brown paper bag.) [17]

Q. Now, do those samples handed to you from Plaintiff's 11 appear to be the same type of wood that you saw on the outside of this snag as you examined it at the deposition taking?

A. Yes. It would be—it could have come from this snag.

Q. Yes. From your examination of the snag

(Testimony of Robert Aufderheide.)

itself, did you determine how long the snag had been dead?

A. I couldn't determine how long the snag had been dead.

Q. What would be your best judgment about it?

A. Except to say that it's been dead, apparently, a long while.

Q. What is your best judgment as to the number of years?

The Court: Did he previously give an estimate?

Mr. Sahlstrom: Yes, sir. He said more than five years.

The Witness: Yes. It would be more than five years; that's correct.

Q. More than ten years? A. Might be.

Q. Did the tree as you observed it appear to be rotted on the outside?

A. I examined the stub yesterday. And, of course, it appears that the bark was around the tree at the—prior to its falling. The bark was torn away from the downhill side and the tree was rotten around the base.

Q. The tree was rotted on the outside? [18]

A. Yes. With the bark around it it might have been quite a bit more difficult to have said just how the particular condition of the tree at the time was.

Q. Did you test the rot to see how deep the rot was through the tree?

A. I didn't test the rot, no.

Q. Did you make any observations as to how deep it was?

(Testimony of Robert Aufderheide.)

A. It's—some of the splinters have torn away from part of the tree. The rot appears to be quite deep.

The Court: Answer this for me: If you had had a man examine that tree prior to the time it fell could you have determined that the tree was rotten and that there was a likelihood of the tree falling?

The Witness: Yes. We could have determined that the tree was rotten. We have—I think the age of it would have indicated that it was old. And one could expect that it would begin to break off and fall.

The Court: If that determination had been made, then, you could have anticipated that the tree might fall over the highway?

The Witness: Well——

The Court: It could have fallen in various directions?

The Witness: Yes.

The Court: But it might have fallen over the highway?

The Witness: Yes, it might have fallen over the highway. [19] These snags frequently will begin to break off in short sections.

This one broke off about 10, 12 feet from the ground.

The Court: Is that an unusual situation?

The Witness: Well, I wouldn't call it unusual. But it's—it varies a little different from the normal pattern.

(Testimony of Robert Aufderheide.)

The Court: It is not the normal situation, but it is not an unusual situation?

The Witness: Yes. That's right.

The Court: Had you discovered the condition of the tree prior to the accident, did you have the facilities with which to remove the tree?

The Witness: I have never understood that it was my duty or responsibility to fall snags or danger trees along the highway.

The Court: Had you in the past done so?

The Witness: No, we have not done so.

The Court: Would you have reported it to the Highway Commission?

The Witness: If we were aware of a tree that looked particularly unsafe, why, we would do that. As a matter of fact, there was a companion tree to this. The Lane County Road Department now has this section of the road, having taken it over last year. And I reported the companion snag [20] to the Road Department and they felled it within the past two weeks.

The Court: So, since this accident you have examined trees along the highway?

The Witness: No. No. We have only examined this particular area—well, just the scene of the accident, and here was this other tree.

The Court: In other words, even though you say it wasn't part of your duties, having noticed that other snag when you were looking and preparing for this case, you then reported it to the Lane County authorities?

(Testimony of Robert Aufderheide.)

The Witness: Yes.

Q. (By Mr. Sahlstrom): Mr. Aufderheide, you recall in the deposition taking that I called your attention that the other dangerous snag was adjacent to the one that fell? Didn't I?

A. Yes. And we were aware of it, too, from our observation.

Q. Well, you knew of it before that time?

A. Yes.

Q. I asked you then what you intended to do about that tree, didn't I?

A. And I took it to—as an official of the Forest Service you were asking whether we were going to fall that tree.

Q. Yes. But I wanted to know why you hadn't removed it, didn't I?

(Discussion, not reported.) [21]

Q. (By Mr. Sahlstrom): Now, isn't it a fact, Mr. Aufderheide, that before the State Road Service goes upon your land to cut these trees they have to get your permission to do so first? A. Yes.

Q. In this case, even though the tree adjoining or right next to the snag that fell was called to the attention of the Lane County Department, they had to have your permission first before they could go in there and fall a tree, didn't they?

A. Yes.

Q. Yes. Since the accident have there been snags falling along the Willamette Highway?

(Testimony of Robert Aufderheide.)

A. Yes. The State Highway has felled snags along the highway below Westfir that I am familiar—I mean below Willamette City.

Q. Yes.

A. And I believe a little below Westfir.

Q. They had to have your permission first?

A. Yes, they obtained our permission.

Q. That was done only after this accident happened?

A. There has been similar snag-falling prior to the accident. This is a situation that has been going on for years.

But this particular recent felling was—well, it happened about—well, since the first of the year.

Q. Now, in this area you are acquainted with the general area where this accident happened, aren't you? [22]

A. Yes.

Q. And you know that there are about 25 homes directly across the Hells Gate Bridge, don't you?

A. Yes.

The Court: Where is the Hells Gate Bridge?

Mr. Sahlstrom: It is on the map. It is the lower part of the map, your Honor, probably a hundred feet or 200 feet from the accident area.

Mr. Luckey: The aerial photo will show it, too.

The Witness: This is the bridge across the river and the homes which Mr. Sahlstrom refers to—well, there are some motels. And here is the Westfir High School. And there are homes in here (indicating). There are also homes——

The Court: Where did the tree fall?

(Testimony of Robert Aufderheide.)

The Witness: It was located right here (indicating), and it fell across the highway this way (indicating).

The Court: And that is approximately how far from this group of homes and motel?

A. I believe Mr. Luckey has the exact distances on that.

The Court: All right.

Q. (By Mr. Sahlstrom): Now, the group of homes is just across the bridge, is it not?

A. Yes.

Q. Yes. A. Not far. [23]

Q. And you know that directly on the highway proper is where the tree fell is a large turn-out area there? There is a parking area and turn-out area?

A. There is a turn-out area.

Q. And you know that that is used for the members of the public to park their cars and to weigh the log trucks as they come down the river, don't you?

A. I hadn't known that log trucks were weighed there. There are cars parked there at times, yes.

The Court: Is there any question about the log trucks being weighed there?

Mr. Luckey: I don't think it is relevant, but it makes no difference.

The Court: Do you admit it?

Mr. Luckey: Yes.

The Court: All right.

Q. (By Mr. Sahlstrom): You knew that prior to the accident that this was a heavy-traveled high-

(Testimony of Robert Aufderheide.)

way between the communities of Westfir and Willamette City, Oakridge?

A. Yes, I would say it was heavily traveled.

Q. Now, in the past you have removed snags for timber sales, have you not? A. Yes.

Q. That's your regular practice, isn't it?

A. Yes. [24]

Q. I will ask you if the Edward Hines Lumber Company is not one of the adjoining property owners to the area where this timber fell?

A. Yes; the property line passes just to the west of the snag quite closely.

Q. I will ask you if you have taken it upon yourself to have a timber sale of the snags in this area either before or since the accident?

A. I am not aware of such a sale. A ranger, William Cummins, is here, and I think he could give that to you.

Q. You have no knowledge about that?

A. No, I have no knowledge.

Q. But you know that is the way to do it, don't you, to have the snags removed, is to have a timber sale of it?

A. If there are sufficient snags to make a chance and if——

The Court: Make a chance?

The Witness: An economic logging chance. A man can't go in for one snag. And a lot of snags have no merchantable wood, which is what the logger is after.

(At this point there was a discussion not transcribed.)

Mr. Sahlstrom: I will call Mr. O'Brien. [25]

DEWEY JACKSON O'BRIEN

produced as a witness in his own behalf, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. Now, your name is Mr. O'Brien. You are the plaintiff in this case? A. That's right.

Q. Where do you live? A. Oakridge.

Q. At my request have you brought into the courtroom here a stub of the snag that fell from which you received your injuries?

A. That's right.

Q. That is the Plaintiff's Exhibit No. 11. When was this removed by you from the stump?

A. It was removed Sunday.

Q. This last Sunday? A. Yes.

Q. Has it been under your control since that time? A. Yes.

Q. You brought it directly here to the courtroom? A. Yes.

The Court: What portion of the tree did you cut it from?

The Witness: That's the piece where the—that came off [26] the snag itself. And it was the butt part of the tree where it broke off the snag.

(Testimony of Dewey Jackson O'Brien.)

(Testimony of Dewey Jackson O'Brien.)

The Court: Just below where it broke?

The Witness: Yes. That was part of the break there.

The Court: That was the stump still standing at the time you cut it off?

The Witness: No. This is the part that's across the road from the stump. The stump itself is still standing. This is a piece—the piece that adjoined onto the stump.

The Court: On what side of the road?

The Witness: It was on the opposite side of the road. That's where they shoved it across the road there after the accident.

The Court: Well, how could you tell that this was part of the same tree?

The Witness: Well, because I knew it was. As a matter of fact, they was people down there the next day was watching them shove it across the road and this tree wasn't there prior to the accident, I know.

The Court: All right.

Q. (By Mr. Sahlstrom): I am going to hand you a couple photographs, Mr. O'Brien.

The Court: Don't you have someone who can identify this tree?

Mr. Luckey: I don't have, your Honor. The only thing I [27] am concerned about, this accident was a couple of years ago. And, apparently, this is off of a piece of wood that's been lying across the road in weather for a couple of years. I don't think it has any particular value to us here.

Q. (By Mr. Sahlstrom): Now, I will hand you

(Testimony of Dewey Jackson O'Brien.)

the Defendant's Exhibit 18. Do you recognize what those pictures show there? A. Yes.

Q. What are they?

A. Well, the upper left-hand corner is a picture of the snag and part of this slope of the highway and the cliff. And the bottom one is the highway looking towards Oakridge. The one to the right is the stump of the snag.

The Court: Tell us briefly how the accident happened.

The Witness: Well, we was coming home from work and the last I remember we stopped at this stop sign and I was talking to my dad in the back seat and I had this leg up in the seat like this (witness demonstrates) and my arm on the backrest. And this leg was sticking ahead (witness demonstrates). There was no warning or no nothing. We didn't know nothing about it till I woke up sitting down alongside the river down by the side of the Willamette. And it was some time later.

The Court: You were not driving the car?

The Witness: No, I was not. The foreman or my boss——

The Court: It is admitted that the tree fell on the car?

Mr. Luckey: Yes, we acknowledge that, your [28] Honor.

The Court: It struck the car as the car was driving down the highway?

The Witness: That's right.

(Testimony of Dewey Jackson O'Brien.)

Mr. Luckey: That's right.

The Court: All right.

Mr. Sahlstrom: I have no further questions of the witness.

Mr. Luckey: May I ask a question or two?

The Court: Yes, surely.

Cross-Examination

By Mr. Luckey:

Q. Mr. O'Brien, how long had you lived up in that area? A. Well, I moved there in 1953.

Q. You had been along this road many times?

A. Yes; I used to work at Hines Lumber Company, Westfir.

Q. Did you ever notice this tree before?

A. Well, I have seen them along there. I don't know this particular tree, but I noticed snags from Oakridge through there.

Q. Anything about this tree that ever attracted your attention before as you drove along there?

A. Well, I can't say just exactly that would attract my attention. I know I seen—not this particular tree, but the one that they fell just here a couple of three weeks ago, [29] because the roots were sticking out over the edge of the cliff on that side off on the slope of the highway.

Q. In reference to this particular tree, was there anything that attracted your attention to it before?

A. No; because it was behind the other tree.

Q. Was it covered with bark just before the accident?

(Testimony of Dewey Jackson O'Brien.)

A. It may have been bark part of the way up. I don't remember.

Q. There was bark and debris around the road, wasn't there, at the scene of the accident after the tree fell? A. Yes.

The Court: After the tree fell?

Mr. Luckey: Yes, your Honor.

The Witness: Because I came through there with an ambulance and seen it.

Q. (By Mr. Luckey): As you travel along the road isn't it a fact it's pretty high up?

A. Yes, it is.

Q. For anybody to observe it you'd have to——

A. Yeah. Well, you could look up out of the window. I know I have looked there several times since.

Q. You couldn't very well drive along and keep an eye on the road and still observe that tree?

A. No. No, you couldn't very well from the driver's seat unless you were coming back the other way. [30]

Q. As you were coming back the other way wasn't it obscured by the bank?

A. Well, yes, I guess it would be. But you could see it, I mean, if you was looking.

Mr. Luckey: Thank you very much, Mr. O'Brien.

Redirect Examination

By Mr. Sahlstrom:

Q. Mr. O'Brien, at my request did you go up there and cut some samples off of the snag, put

(Testimony of Dewey Jackson O'Brien.)

them in a paper bag, and bring them down to my office? A. Was it at your request?

Mr. Sahlstrom: Yes.

Q. Did you do that? A. Yes, I did.

Mr. Sahlstrom: I will hand you Plaintiff's Exhibit 11.

The Witness: Yes. That is them. That's off of that piece right there (indicating).

Q. They were taken from Exhibit No. 11 here, I guess? A. Yes.

Q. All right.

A. They was—that's where I chopped them off. As a matter of fact, I think they will match up.

Mr. Sahlstrom: No further questions. [31]

Recross-Examination

By Mr. Luckey:

Q. These were taken at the same time, last Sunday?

A. No. No. I had this here—this was taken—well let's see. That was taken about a month ago.

Mr. Luckey: All right. Thank you very much.

(Witness excused.)

Mr. Sahlstrom: Call Mr. Presstinen as an adverse witness. [32]

FRED M. PRESSTINEN

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

(Testimony of Fred M. Presstinen.)

Direct Examination

By Mr. Sahlstrom:

Q. Where do you live, Mr. Presstinen?

A. 1509 West First, Eugene, Oregon.

Q. What is your occupation?

A. I am a Forester and I am on the Forest Supervisor's staff of fire control.

Q. Did you make an examination of the premises where the accident happened in this case?

A. Yes, I did.

Q. On what date?

A. Oh, I believe it was August 7th.

Q. August 7th? A. 1956.

Q. And, again, what date?

A. '57. Beg your pardon.

Q. At some later date, too?

A. Yes. I was there——

Q. In December?

A. ——in December and again—I was up there yesterday.

Q. All right. You made an examination of the tree from which this snag fell? [33]

A. Yes, I did.

Q. Have you examined Exhibit No. 11 here in court? A. Yes.

Q. Does that appear to be the same one?

A. Well, it resembles the wood of the dead tree there. I wouldn't know definitely if that's off of the same piece.

(Testimony of Fred M. Presstinen.)

Q. Does it appear to be in the same condition as when you saw it? A. Yes.

Q. Have you made an examination of it here in the courtroom?

A. Yes, I have, just hastily.

Q. Can you tell the Court how deep the rot is on that stub of the tree?

A. Well, on this one side there it's about 8 to 10 inches on that one side.

Q. Yes. Is the rot visible from the exterior?

A. Yes. There is some visible there.

Q. Yes. Now, how do you describe this material? Is it rot or punk or what is that?

A. Well, it's a brown rot. There are several of them. And it would take an analysis to determine which one they are. It's a cubicle brown rot.

Q. What causes that?

A. Well, the analysis would tell. Some of them attack the tree while it's still green and some attack the tree after it's [34] dead. I'm not positive which one this is.

Q. From your examination of the premises there and your examination of the snag after the accident happened and again here in the courtroom today, what is your best judgment as to the length of time that this tree has been dead?

A. Well, it would be difficult to say exactly, but I would say it's—it would be 15 or 20 years, something like that. That's purely an estimate.

Mr. Sahlstrom: No further questions.

(Testimony of Fred M. Presstinen.)

Cross-Examination

By Mr. Luckey:

Q. Mr. Presstinen, does a tree after it's down continue to rot if a portion of it were lying along the ground? A. Yes.

Q. Would that continue to rot faster than it would when it was a standing tree, or about the same, or what?

A. It would depend on the type of rot that was attacking it. Sometimes it would and sometimes it wouldn't.

Q. Do you have any idea about this particular rot?

A. No. I say, I don't know which—it's a brown rot and there are several brown rots.

Q. But, as a matter of fact, isn't the tree more exposed to the elements, the rain, the weather and so forth, by being along horizontally on the ground and in contact with the [35] ground?

A. You have a larger area exposed, yes.

Mr. Luckey: Thank you.

Redirect Examination

By Mr. Sahlstrom:

Q. In connection with your examination did you measure the length of this tree, Mr. Presstinen?

A. The portion that was laying over the bank, was that your question?

Q. Yes, sir.

(Testimony of Fred M. Presstinen.)

A. No, I did not. I assumed that was from a snag. But I am not positive that it came off it.

Q. Yes. What is the approximate diameter of the tree—of the snag, as you observed it, after the accident and again here in the courtroom?

A. Well, that section there (indicating)——

Q. Yes. A. Oh, that's about 2-1/2 feet.

Mr. Sahlstrom: No further questions.

Plaintiff rests, your Honor.

(Plaintiff rests.)

Mr. Luckey: The defendant will call Mr. [36] Stone.

J. HERBERT STONE

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Luckey:

Q. Mr. Stone, would you state your residence and position, please?

A. I live at 4465 Southwest 75th Avenue, Portland, Oregon, and I am the Regional Forester for Region 6 of the U. S. Forest Service.

Q. What territory does that encompass, involve?

A. That covers the national forest lands in Washington and Oregon, with a little bit—a very small amount in California.

Q. About how many acres do you have under your administration of national forest land?

A. Approximate 23,350,000 acres.

(Testimony of J. Herbert Stone.)

The Court: How many acres are there in the State of Oregon in total?

The Witness: You mean how many acres of national forest?

The Court: No. How many acres? How does that compare with the State of Oregon?

The Witness: The State of Oregon, as I recall, has approximately 66,000,000 acres.

The Court: So it is about one-third of the State of Oregon? [37]

The Witness: Yes. But this is spread over Washington, Oregon and a little bit in California.

Q. (By Mr. Luckey): How many miles of State, County and private roads are there that run through that national forest land in the area you administer? A. Approximately 3,000 miles.

Q. Now, with reference to the—to these private and State and County roads, what has been your practice with reference to trees that may be called to the attention of the Forest Service as danger trees to the driving public?

A. On these State, County and private roads that traverse or cross through national forest land we have not felt that it was our responsibility or duty to make an inspection of these to determine danger trees.

But our Forest Supervisors have been authorized to permit the State or the County or private agencies to fell any trees that may be danger trees—to give them permits to do that.

Q. Now, Mr. Stone, are those occasions when live

(Testimony of J. Herbert Stone.)

green trees fall across roads or fall down in the forests, as well as dead trees? A. Yes.

Q. Is there any way of ascertaining how long a dead snag may stand?

A. I know of no precise way of determining how long a dead [38] snag would stand. I have seen snags in areas or reported stands of timber over 200 years old and these snags were evidently there before that stand initiated—grew.

The Court: You mean the snags are over 200 years old?

The Witness: Well, that's just an estimate. I don't know that. But in this particular case the snag showed evidence of fire, and green timber which was over 200 years old did not show evidence of fire.

Mr. Luckey: Now, in the administration of these forests do you have any funds with which to cut down snags or danger trees for the safety of the traveling public as such?

Mr. Sahlstrom: I will object to the relevancy of the question, your Honor.

The Court: It will be overruled.

The Witness: We have no funds that are available for the felling of danger trees on State and County, private roads traversing national forest land unless they happen to be an old burn or cutting area on which we must fell snags as a fire-protection measure.

Q. (By Mr. Luckey): Are there any regulations that direct you to inspect or remove such trees for the traveling public?

(Testimony of J. Herbert Stone.)

A. Not from—along State and County and private roads.

Q. On this particular road and on roads in general in the State of Oregon through which the State Highways pass involving national forest lands abutting these highways, what has been [39] the practice with reference to the State removing such trees?

A. It has been our practice to issue permits to State or County authorities to remove any danger trees.

Q. Do they make requests for such permission to cut?

A. They make those requests through the Forest Supervisor or Ranger and Forest Supervisor who has the authority to issue those permits.

Q. Was any permission ever requested to cut this snag?

A. I do not know. The Supervisor of the Forest would—or Ranger would have that information.

Q. No request—

A. But no request was made to me, no.

Q. Did you have any personal knowledge of this particular tree? A. No, sir.

Q. Are you familiar with the area?

A. Yes, I am familiar with the general area. I have been through there.

Q. Was this tree standing in an area that was in its natural state, or was it an area that had been cut over or redeveloped, reseeded, or anything of that kind?

A. As I recollect—and I get up there very in-

(Testimony of J. Herbert Stone.)

frequently—but, as I recollect, there was a stand of timber up on the hillside there. But I don't have any real impression as to what the nature of that stand of timber was.

Q. Is there any forest trail right——

Mr. Sahlstrom: He testified he didn't know.

The Court: He testified he didn't know. Why don't you have some witness who is very well acquainted with this area?

Mr. Luckey: We will have Mr. Cummins explain that.

The Court: Any further questions?

Cross-Examination

By Mr. Sahlstrom:

Q. Mr. Stone, are dead snags more dangerous than live trees?

A. I don't know that I would be able to say one way or the other because I have seen some green trees, live trees, that have rot hidden in them and under wind pressure they break off even more—even sooner than the dead snags.

Q. Well, don't you regard these dead snags as hazards from a fire standpoint?

A. Yes, indeed, we certainly do. They throw fire. If a snag gets on fire it acts as a torch and the wind will blow sparks.

Q. You do have funds appropriated for removal of snags?

A. We have funds available for the reduction of fire hazard.

(Testimony of J. Herbert Stone.)

Q. Yes.

A. That's true. [41]

Q. This tree had some evidence on it of being in a burn at one time.

A. I don't know. I haven't seen that tree or the area.

Q. Was that your statement on direct, that there was some evidence of a burn in this area?

The Court: He never said that.

The Witness: No, not this particular tree.

Q. (By Mr. Sahlstrom): Not this particular tree? A. I was——

The Court: That was a hypothetical question about snags that had been standing for 200 years after they had been burned.

Mr. Sahlstrom: I have no further questions. Thank you.

Mr. Luckey: Thank you.

(Witness excused.)

Mr. Luckey: I would offer, your Honor, the exhibits that we have, 1 to 17, showing the co-operative agreements with the State of Oregon for the maintenance of this highway.

The Court: Have you shown them to Mr. Sahlstrom?

Mr. Sahlstrom: I have seen them, but I haven't read them, your Honor.

The Court: Any objection?

Mr. Sahlstrom: No objection.

The Court: They will be admitted. [42]

(At this point Defendant's Exhibits 1 to 17, were received in evidence.)

(At this point after some discussion Defendant's Exhibit 21, being Minutes of the State Highway Commission, was marked for Identification and received in evidence.)

(At this point after some discussion Defendant's Exhibits 24, 25 and 26, being letters from the Oregon State Highway Commission, were marked for Identification and received in evidence.)

(At this point after some discussion Defendant's Exhibits 27 to 34, being administrative use permits, were marked for Identification and received in evidence.) [43]

D. J. SAGE

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Luckey:

Q. Mr. Sage, where do you live?

A. I live here at Eugene.

Q. What is your occupation, sir?

A. I am District Maintenance Superintendent for the Oregon State Highway Department.

Q. How long have you been so employed?

A. Pardon?

Q. How long have you been so employed?

(Testimony of D. J. Sage.)

A. I have been employed for 22 years in that capacity.

Q. How long have you been headquartered at Eugene? A. Four years and two months.

Q. Do you have supervision of the maintenance of the Willamette Highway, or did you have on November 13, 1956, supervision of this particular portion of the highway that ran between Oakridge and Westfir? A. Yes, sir.

Q. I understand since that time the County has taken that portion of the road over; is that right?

A. That's correct.

Q. Now, at the time you had supervision of that portion of [44] the highway, was your attention ever directed to a snag that later fell across the road and injured Mr. O'Brien?

The Witness: Would you repeat the question, please?

(At this point Mr. Luckey's last question to the witness was read by the Court Reporter.)

The Court: That is, prior to the accident.

The Witness: No.

Q. (By Mr. Luckey): Had you ever seen the snag? A. No.

The Court: Not that you remember?

The Witness: That is correct; not that I remember. I wasn't familiar with the snag until after it fell.

Q. (By Mr. Luckey): Now, do you have people who patrol the highway for maintenance purposes

(Testimony of D. J. Sage.)

in that area? A. Yes, sir.

Q. And do those people also call to the attention of the Forest Service the trees that they consider dangerous to the public traveling the highway? A. On various occasions, yes.

Q. There has been permission to cut such trees, has there not, from the Forest Service?

A. Yes.

The Court: Do they have a blanket policy permitting the removal of these danger trees, or do you have to get the [45] permission of the Forest Service each time you decide to remove the danger tree?

The Witness: Generally speaking, we go over the work with the Forest Ranger and determine the trees that we would like to cut and then secure the permission, if possible, to cut those trees.

The Court: Have you ever been turned down for permission to cut a danger tree?

The Witness: Well, let me answer it this way: In our opinion a tree might be dangerous, but it might not be in the opinion of the Forest Service. And our request—we like to cut the trees, but we don't always receive permission.

The Court: In other words, it's not a permission granted in advance, but you must secure the permission of the Forest Service in order to cut a particular tree?

The Witness: Yes, sir.

Q. (By Mr. Luckey): Mr. Sage, do you recall talking to Mr. McCulloch, one of the F.B.I. agents, about this particular snag? A. Yes.

(Testimony of D. J. Sage.)

Q. Was there any discussion with reference to the height of the snag at that time or whether or not it might reach the road?

A. No, I do not recall.

Q. You don't recall that. Have you driven that road fairly [46] frequently in connection with your duties before this accident?

A. Would you ask me that again, please?

Q. Have you driven that road fairly frequently before this accident in connection with your duties?

A. Generally about once a week.

Q. Do you know what snag is involved now after the accident? A. Yes.

Q. Was there anything that ever attracted your attention to that snag before the accident?

A. No.

The Court: That's all.

Mr. Sahlstrom: No questions.

The Court: Next witness.

(Witness excused.) [47]

WILLIAM CUMMINS

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Luckey:

Q. Where do you live, Mr. Cummins?

A. At 855 South 2nd Street in Prineville.

(Testimony of William Cummins.)

Q. Where did you live on November 13th, 1956?

A. Oakridge.

Q. How long have you lived in Oakridge prior to that time?

A. Fourteen years.

Q. When did you move to Prineville?

A. March 21st.

Q. This year?

A. Yes.

Q. What were your duties at Oakridge?

A. District Ranger of the Oakridge District.
That was the administration of this Ranger District.

Q. On or after November 13th, 1956, was your attention called to a tree that fell across the road in the vicinity of Hells Gate Bridge?

A. After——

The Court: After it fell.

The Witness: Yes.

Q. (By Mr. Luckey): Was that from the area that you [48] administered?

A. Yes, it was.

Q. Now, are there any forest trails right adjacent to that tree?

A. There are no forest trails near there.

Q. Are there any forest camps immediately adjacent to it?

A. The nearest forest camp is Fair Run Camp about a mile and a half.

Q. How far is this tree from Oakridge or Wilamette City?

A. A little over two miles. About two miles.

Q. How far is it across the bridge to the motel?

A. Between 1,300 to 1,500 feet.

Q. Is the motel on the other side of the river

(Testimony of William Cummins.)

from this—— A. Yes, it is.

Q. ——particular area? The weighing of logs has been mentioned here. Are there any stationary scales in the vicinity of the tree?

A. No. The nearest scale is at Pleasant Hill.

Q. If there were weighing of logs, then, it would be by temporary portable scales?

A. That is correct.

Q. Now, how far is it about to Westfir from this area?

A. Well, the nearest house is a little over half a mile and the center of Westfir is, probably, a little over a mile, two miles. [49]

Q. Had you traveled this area frequently in connection with your duties?

A. Yes. It's on one of the areas that I travel.

Q. Had anything attracted your attention to this particular snag or tree?

A. Not before it fell; no, sir.

Q. Had anyone ever made any request of you to cut it? A. No.

Q. Had anyone ever called it to your attention?

A. No.

Q. Now, in connection with the management of that area, in the event that you had known that there were one or two snags in the location of this snag, would a sale have been feasible?

A. Not on that type of ground. It's very steep and there is no place to work in there.

Q. Did you have any funds at your disposal for

(Testimony of William Cummins.)

cutting such trees for the safety of the traveling public? A. No.

Q. What was the practice of the State Highway people who maintain the highway up there with reference to these trees in your area?

A. Since I have been in Oakridge they have requested permission to fall danger trees along the highway.

Q. Has that permission been granted? [50]

A. I have not refused permission to fall danger trees.

Q. Now, with reference to green trees, have green trees fallen across roads in the area?

A. Yes; more green trees than dead trees.

The Court: Isn't that due to the fact that there are more green trees than dead trees?

The Witness: I think that's correct.

Q. (By Mr. Luckey): Do you know whether or not this tree had bark on it before it fell?

A. I looked at the stump—if this answers the question, I looked at the stump afterwards and there was bark around the stump and there was also bark down on the road. So I would assume that there was bark around at least part of it.

Q. Did you see the remains of the tree shortly after the accident?

A. Yes. I didn't examine it carefully.

Q. Do you have a reasonable knowledge or estimate of the length of it?

A. I could not say the length of the tree now. I don't recall.

(Testimony of William Cummins.)

The Court: It was a pretty big tree, wasn't it?

The Witness: It was a large tree; yes, sir.

Q. (By Mr. Luckey): Was it among other growing trees?

A. I think there were younger trees. These were some of the older trees around there. I don't picture the forest [51] right at that spot now. But there are green trees around there, but I think generally a little younger age tree.

Q. Were these trees growing in their natural state? A. Yes, they were.

Q. Was there any cultivation around them or anything of that kind?

A. No. This is just woodland country.

Q. Are there rocks and things of that kind in the area, too?

A. Well, I didn't particularly notice. There are—it's very steep ground and there are—I didn't notice any loose rocks, if you mean loose rocks.

Q. Mr. Cummins, I wonder if you might have Exhibit 11 which is the aerial photograph? Do you utilize those aerial photographs in connection with your timber-management program?

A. Yes, sir.

Q. What is the purpose or use of those aerial photographs for timber management?

A. Well, we use them for locating areas to—of old-growth timber in which to make sales where you can distinguish the older trees from areas of reproduction.

We use them in locating roads, also to see what

(Testimony of William Cummins.)

the difficulties would be with the areas of rock slides and steep draws. I think those are the major uses we make of them.

Q. Now, Mr. Cummins, as you drove along the highway you have told us that this tree had never attracted your attention [52] before. Was the tree easily visible to someone driving along the road?

A. It wasn't to me. There is an intersection at that spot. That's one thing to attract your attention on the road going on the bridge—or from Westfir. And the other point is that it's a steep bank and you just don't normally look out—up at the tree at the location where it was.

Q. Then, in order to locate it, as a practical matter you would be required to walk on the ground and observe these——

Mr. Sahlstrom: I object, your Honor. That's leading and it calls for a conclusion.

The Court: I will sustain the objection.

Q. (By Mr. Luckey): What did you have to do to find this tree?

A. Well, if you stop and get out and look, you can see it. Or it's possible coming over from the bridge if you were particularly looking at the spot you can look at it if your attention is directed to it.

The Court: When was this aerial photograph taken?

The Witness: I could not say.

The Court: Was it before the accident?

The Witness: I wouldn't know when it was taken. I presume it was before the accident.

(Testimony of William Cummins.)

The Court: Did you examine this photograph to determine the presence or absence of snags in the area? [53]

The Witness: No, sir.

The Court: Or dead trees?

The Witness: No, sir.

The Court: Could you have by the use of a magnifying glass discovered the presence of a single dead tree?

The Witness: If I was trying to locate a particular point on the map and I knew it was there, it might be possible. I don't know. We do locate points sometimes.

But where there is a number of trees it's extremely difficult to tell what tree you are looking at. A snag, of course, would have no crown, no top to see. And it's quite difficult to locate it; particularly a green tree.

Q. (By Mr. Luckey): How many people did you have to manage this timber sales in your area?

A. Of the—in Oakridge? Of the permanent people, probably eight.

Q. About eight people?

A. About eight people.

Q. How big an area did you have?

A. I beg your pardon. That's not to manage timber solely. Of the folks that manage the timber we have—well, more like four.

The Court: I don't know what you mean by managing timber.

(Testimony of William Cummins.)

Q. (By Mr. Luckey): Would you explain what you mean by that?

A. We have men that are in charge of fire control maintaining [54] trails and telephone lines.

The Court: That is four people. Did you say you had four people in connection with that work?

The Witness: In connection with timber sales. But comparing timber and administrating sales——

The Court: Four. The other four worked in management?

The Witness: Yes. They are in——

The Court: But in summer you have more?

The Witness: Yes. We have lookouts and guards.

The Court: How big an area?

The Witness: Two hundred thirty-one thousand six hundred and some acres.

The Court: How does that compare with the size of Lane County?

The Witness: I could not say the size of Lane County.

The Court: Is that a pretty big area?

The Witness: The district?

The Court: Yes.

The Witness: It's a—I think it's one of the largest districts.

Mr. Luckey: I think that's all.

(Testimony of William Cummins.)

Cross-Examination

By Mr. Sahlstrom:

Q. Mr. Cummins, as you are westbound traveling along this [55] highway from Oakridge to Westfir, Oregon, or to Eugene, if you look to your right as you are westbound that tree—the snag is clearly visible, is it not?

A. No, I wouldn't—not to me it wasn't.

Q. What photograph do you have before you?

A. Are these marked in any way?

The Court: Here is one of the photographs.

The Witness: I have this photograph.

The Court: Here is a group of other photographs. Were you talking about looking south on the highway?

Mr. Sahlstrom: As you drive west you would look to the right. That would be up the hill.

The Court: Well, maybe this is the one you are referring to, Defendant's 18.

The Witness: The hillside is on the left. I think he refers to coming the other way and looking to the right.

Mr. Sahlstrom: Hand Plaintiff's No. 2 to the witness.

Q. That's Plaintiff's Exhibit No. 2. Now, that indicates a view to the right as you are westbound directly opposite the sign and up the hill. Now, from that point is the snag clearly visible?

A. Yes, it is. But you are not on the—you're not

(Testimony of William Cummins.)

on the road; you're off to the side of the road from this view.

Q. All right. Now, you take various aerial photographs. The one you have there in your possession is one that's been [56] a part of your records and under your direction and under your control, is it not; part of your records?

A. We have aerial photos of this district and of this particular spot.

Q. They are part of your records there at Oakridge, are they not? A. That is correct.

Q. And they are used in connection with your work? A. Yes.

Q. Now, how do you look at that aerial photograph? How do you determine the number of trees in a given area? What guides do you use?

A. To determine the number of trees?

Q. Well, how do you look at that photograph? What do you use to look at it with?

A. Well, I personally use it just looking at two pictures together——

Q. Don't you have some kind of equipment to use? A. Yes, we do.

Q. Well, describe it. What is it?

A. There is a stereoscope that may be used.

Q. What is that?

A. It is a glass which gives a three-dimensional effect to the picture if you put two pictures together and look at it. It gives a three-dimensional effect of seeing the hills [57] and the trees.

Q. Does that give you a close-up of the trees?

(Testimony of William Cummins.)

A. It may have some—I couldn't say as to that. I think the effect is to give it the three-dimensional effect. That's what they are after with that.

Q. What else do you use? What other kind of equipment do you use to view those photographs with?

A. I don't believe I understand.

The Court: Do you use a magnifying glass?

The Witness: No, I don't.

Q. (By Mr. Sahlstrom): Don't you have some kind of equipment to look at those aerial photos after you take them?

A. We use this—the—the only machine that I know of or—I think the thing that you are asking about is this stereoscope. That's all I know of.

Q. Right. Stereoscope. Now, if you look at that, don't you get a close-up view of the trees?

A. It may have some—I couldn't say.

Q. Haven't you ever used it?

A. I have.

Q. Don't you know if it gives a close-up or not?

A. I rarely use it.

Q. When you have used it, doesn't it give a close-up view?

A. I couldn't say that it magnifies any. I don't know.

Q. Well, what do you use it for, then? [58]

A. To get a three-dimensional effect to the——

Q. What is the advantage of that?

A. You can tell where the draws are, where the hills for road locations and for boundaries of timber sales units are.

(Testimony of William Cummins.)

Q. Are these aerial photographs used for cruises of a given area?

A. For a cruise. To determine volume, you mean?

Q. Yes.

A. I don't use it for that purpose, no.

Q. Are they used for that purpose?

A. I could not say. I beg your pardon. It's possible to if there are—I can't think of now any particular way that you would see it. I was thinking that you might in an area determine the size of an area and then through information that we had previously obtained get a volume.

Q. Well, don't you know that that is done here in Lane County, that practice is followed here?

A. Which practice is that?

Q. Of taking aerial photographs to assist in the cruise of a given quantity of timber of a given area? Don't you know that to be a fact?

A. I—I don't use them.

The Court: Do you know if other people use them to determine volume in a given area?

A. No, I don't know that. [59]

The Court: All right. He doesn't know.

Q. (By Mr. Sahlstrom): Have you yourself ever used those aerial photographs to determine the quantity of dead trees in a given area either for fire purposes or for timber sale purposes or other purposes? A. Not for quantity. For area, yes.

Q. Well, not for quantity. I don't limit the question to that. Have you used the aerial photo-

(Testimony of William Cummins.)

graphs to determine the quantity or number of dead trees in a given area?

A. Not to my recollection.

Q. Well, do people in your department do that?

A. Not to my recollection.

Q. How do you determine the quantity of snags in a given area, Mr. Cummins?

A. We go on the ground. We would use an aerial photo to first locate some of the boundaries of it and then we would go on the ground and actually count the trees.

Q. What is the purpose of that?

A. To determine the volume on the ground on the area.

Q. It is feasible economically to have a re-log or cutting of timber, dead trees, is it not; a timber sale of dead trees?

A. That's the purpose, to go on the ground to see that the ground is suitable and that there is adequate number of trees, yes.

Q. All right. When was this done in this particular area? [60] When was it done prior to November 13th, '56? When did you do that?

A. I never did it in this particular area where this snag——

Q. When did your department do it?

A. We have never done that.

Q. Why not?

A. We have not had occasion. It isn't a suitable place for a sale on the highway.

Q. Is that your only reason?

(Testimony of William Cummins.)

The Court: Have you got another reason to suggest?

Mr. Sahlstrom: Yes. They just hadn't gotten around to it, probably. Hadn't done it.

The Court: Is that right?

The Witness: We—we have a plan of making timber sales and it's projected over a period of time. We don't have the entire district laid out in sales or the volume obtained for all of the entire district, so we just obtain that information for the areas that we are actually selling or contemplate selling. This is not in one of those areas.

Q. (By Mr. Sahlstrom): But this tree is almost rotted all the way through. Now, I take it that it's been there a sufficient length of time for you to have made an examination of it for a count of it in connection with your timber sales.

The Court: I think he has already answered that, that this is not an area that they are contemplating selling anything [61] from in the immediate future.

Q. (By Mr. Sahlstrom): Now, did you notice in your examination of the premises where the accident happened that this snag was in an area where the bank had been cut away—close to the bank cutaway of the highway itself?

A. This is just above the upper limits of the cutting, yes, of the ground disturbance for the road.

Q. Did you notice that some of the dirt was removed away from the area of the roots of this particular snag by the bank cutaway?

(Testimony of William Cummins.)

A. No; I didn't notice that.

Q. Now, getting back to timber sales, you say that because of the steepness of this area it wouldn't be feasible. Now, isn't it true, Mr. Cummins, that there are timber sales in areas in Lane County where the area is steeper than this? A. Yes.

Q. Yes. Now, you say that when the Highway Department wants to cut a tree it comes to you for permission. Now, I take it that you have the sole determination in your office as to whether or not a tree is dangerous or not. Isn't that right? Just because they come to you and say it's dangerous it doesn't mean it's dangerous as far as you're concerned? A. That's right.

Q. So I take it that is what Mr. Sage means when he says a tree is dangerous and then you reserve the right to determine [62] if it is dangerous or not; is that correct?

A. We have the final authority to give the permit.

Q. Yes.

A. We have very few disagreements.

Q. Now, did you know that there are about 25 new homes there just across the Hells Gate Bridge near the motel that you spoke about, 25 family units living right there?

A. There is—that—there is a family—there is a building group, but it's not just in this place I'm talking about. It's farther down the river. That's correct.

(Testimony of William Cummins.)

Q. Well, it's just directly across the Hells Gate Bridge, is it not?

A. No. It's across the river and over on—off of the main—the new highway now.

The Court: About how far is that from where the tree fell?

The Witness: I'd say a mile.

The Court: About a mile?

The Witness: That's a guess.

Mr. Sahlstrom: No further questions. Thank you.

Redirect Examination

By Mr. Luckey:

Q. Mr. Cummins, with reference to the sales on steep land, do you know of any sales for one dead snag on land as steep [63] as this? A. No.

Mr. Luckey: That's all.

The Court: Call your next witness.

Mr. Luckey: The defendant will rest, your Honor.

The Court: Rebuttal?

Mr. Sahlstrom: No rebuttal. I would offer one more Plaintiff's photograph.

The Court: It is admitted.

(Further discussion followed, not transcribed.) [64]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Jack Ellis, an Official Reporter of the above-entitled Court, do hereby certify that on May 14, 1958, at Eugene, Oregon, I reported in stenotype the proceedings had in the above-entitled matter, that I thereafter caused to be reduced to typewriting under my direction an excerpt from the proceedings so reported by me, and that the foregoing transcript, constituting Pages 1 to 64, both inclusive, constitutes a full, true and accurate transcript of said excerpt so reported by me in stenotype on said date, as aforesaid.

Dated at Portland, Oregon, this 19th day of July, 1958.

/s/ JACK ELLIS,
Official Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pretrial Order; Opinion of Judge Solomon; Findings of fact and conclusions of law; Judgment; Notice of appeal; Bond for costs on appeal; Statement of points and designation of record on appeal; Defendant-appellee's counter-designation

of record on appeal; Order to transmit exhibits to Court of Appeals and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9266, in which Dewey J. O'Brien is the plaintiff and appellant and United States of America is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's "Excerpt from Proceedings" filed in this office. Plaintiff's exhibits 2 and 6, and defendant's exhibits 1 to 17; 20; 21; 24 to 26 and 27 to 34 are being forwarded under separate cover. Plaintiff's exhibit 7 and defendant's exhibit 18 are being forwarded by the attorneys for plaintiff.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 16th day of January, 1959.

[Seal]

R. E. DE MOTT,
Clerk;

By /s/ THONA LUND,
Deputy.

[Endorsed]: No. 16335. United States Court of Appeals for the Ninth Circuit. Dewey J. O'Brien, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed January 19, 1959.

Docketed: January 26, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

